

Malaysia Airports (Sepang) Sdn Bhd & Anor v Federal Express Brokerage Sdn Bhd & Ors (Attorney General Malaysia, intervener)

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FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(F)-72-10 OF 2012(W)

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ZULKEFLI CJ (MALAYA), RICHARD MALANJUM CJ (SABAH AND SARAWAK), HASHIM YUSOFF, ABDULL HAMID EMBONG AND HASAN LAH FCJJ
24 SEPTEMBER 2013

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Administrative Law — Exercise of administrative powers — Subsidiary legislation — Whether regulations enabling authority to charge fee for use of facilities and services in free commercial zone ('FCZ') ultra vires Free Zones Act 1990 — Whether Act permitted imposition of fee — Whether fee was not tax but a charge to enable authority to administer, maintain and operate FCZ

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The first appellant was appointed by the Minister of Finance ('the Minister') to administer, maintain and operate the Kuala Lumpur International Airport Free Commercial Zone ('FCZ') under s 3(2) of the Free Zones Act 1990 ('the Act'). To enable it to carry out its functions, the first appellant imposed a fee on all parties who carried out commercial activities at the FCZ which included the respondents who were members, inter alia, of the Air Freight Forwarders Association ('AFAM'). When a dispute arose over the quantum of the fee that would be imposed, the Minister decided to set it at RM5 per approved customs declaration and this information was conveyed to AFAM in a letter ('the letter'). The letter also stated that unless the fee was paid by AFAM's members, the first appellant would not be able to continue to maintain and operate the FCZ. The respondents refused to pay the fee and filed an action in the High Court to, inter alia, declare (i) the letter void ab initio and/or contrary to law (ii) that the appellants had no authority to collect the fee and (iii) that the first appellant return all monies collected from the respondents from the year 2000. The High Court dismissed the respondent's action holding that ss 10(3) and 13(2) of the Act gave the Minister power to impose conditions in the form of charges. On appeal, the Court of Appeal reversed the High Court's decision holding that ss 10(3) and 13(2) of the Act did not show any intention by Parliament to confer on the Minister a discretion or power to impose a charge or levy in respect of activities carried out in the FCZ and that reg 8A of the Free Zones Regulations 1991 pursuant to which the fee was imposed, was ultra vires the Act. The appellants, and the attorney general as intervenor, contended that the charge imposed by the first appellant was neither a tax nor a levy. The respondents, on the other hand, argued that the fee charged was a tax, duty or

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A levy as there was neither a contractual basis for it nor was it provided for under the Act.

Held, allowing the appeal with costs, setting aside the decision of the Court of Appeal and restoring the order of the High Court:

- B (1) The Minister of Finance had power under the Free Zones Act 1990 to impose charges on activities carried out, or for facilities and services provided, under the said Act (see paras 1 & 21).
- C (2) As the appellants' function was to administer, maintain and operate the free zone, the Minister was justified in imposing the condition of the charge on persons who used the facilities and services provided in the free zone. This was allowed under s 10(3) of the Act. That section read together with s 13(2) of the Act gave the Minister power to give directions that were necessary to the relevant authority, and in the present case, to the appellants for the proper functioning of a free zone. Regulation 8A was therefore validly made pursuant to s 47 of the Act (see paras 15 & 17).
- D (3) Section 10(3) of the Act was of wide import and gave the Minister very wide powers to impose 'conditions' he deemed fit for the purpose of carrying out any activity in the free zone. This included imposing a charge or fee for the benefit of the Authority for providing the facilities and services in the free zone. The charge or fee imposed was not for public purpose or for the purposes of the Federation (see para 19).
- E (4) Section 4 of the Act clearly stated that no tax was collected for the purpose of activities carried out in the free zone. A tax was the money a government levied upon an individual or business for having performed a particular action or completed a particular transaction whereas a fee, even if it was paid to the government by individuals or by a business, was specifically applied for the use of a service. Money from the fee was generally not applied to uses other than to providing the service for which the fee was applied. And usually, a fee rate was directly tied to the cost of maintaining the service (see paras 13 & 20).
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H **[Bahasa Malaysia summary]**

Perayu pertama dilantik oleh Menteri Kewangan ('Menteri') untuk mentadbir, mengekalkan dan menguruskan operasi Zon Perniagaan Bebas Lapangan Antarabangsa Kuala Lumpur ('ZPB') di bawah s 3(2) Akta Zon Bebas 1990 ('Akta'). Untuk membolehkan ia menjalankan fungsi-fungsinya, perayu pertama mengenakan fi ke atas kesemua pihak-pihak yang menjalankan aktiviti-aktiviti perniagaan di ZPB termasuk responden-responden yang mana adalah ahli-ahli, antara lain, Air Freight Forwarders Association ('AFAM'). Apabila pertikaian berbangkit ke atas kuantum fi yang akan dikenakan, Menteri memutuskan untuk menetapkan pada RM5 untuk satu deklarasi

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kastam yang diluluskan dan maklumat ini disampaikan kepada AFAM di dalam surat ('surat tersebut'). Surat tersebut juga menyatakan bahawa kecuali fi dibayar oleh ahli-ahli AFAM, perayu pertama tidak dapat meneruskan untuk mengekalkan dan menguruskan operasi ZPB. Responden-responden enggan membayar fi tersebut dan memfailkan tindakan di Mahkamah Tinggi untuk, antara lain, mengisytiharkan (i) surat tersebut tak sah ab initio dan/atau bertentangan undang-undang (ii) bahawa perayu-perayu tidak mempunyai kuasa untuk mengutip fi dan (ii) bahawa perayu pertama memulangkan kesemua wang yang dikutip daripada responden-responden dari tahun 2000. Mahkamah Tinggi menolak tindakan responden memutuskan bahawa ss 10(3) dan 13(2) Akta memberikan Menteri kuasa untuk mengenakan syarat-syarat dalam bentuk caj-caj. Atas rayuan, Mahkamah Rayuan mengakas keputusan Mahkamah Tinggi memutuskan bahawa ss 10(3) dan 13(2) Akta tidak menunjukkan apa-apa niat oleh Parlimen untuk memberikan kepada Menteri budi bicara atau kuasa untuk mengenakan caj atau levi berkaitan aktiviti-aktiviti yang dijalankan di ZPB dan bahawa peraturan 8A Peraturan-Peraturan Zon Bebas 1991 berikutan fi yang patut dikenakan, adalah ultra vires Akta. Perayu-perayu, dan peguam negara sebagai pencilah, berhujah bahawa caj yang dikenakan oleh perayu pertama bukan cukai ataupun levi. Responden-responden, sebaliknya berhujah bahawa fi yang dikenakan adalah cukai, duti atau levi memandangkan tidak terdapat asas kontrak untuknya ataupun ia tidak diperuntukkan di bawah Akta.

Diputuskan, membenarkan rayuan dengan kos, mengetepikan keputusan Mahkamah Rayuan dan mengekalkan perintah Mahkamah Tinggi:

- (1) Menteri Kewangan mempunyai kuasa di bawah Akta Zon Bebas 1990 untuk mengenakan caj-caj ke atas aktiviti-aktiviti yang dijalankan, atau untuk kemudahan-kemudahan dan khidmat yang diperuntukkan, di bawah Akta tersebut (lihat perenggan 1 & 21).
- (2) Memandangkan fungsi-fungsi perayu-perayu adalah untuk mentadbir, mengekalkan dan menguruskan operasi zon bebas, Menteri berjustifikasi dalam mengenakan syarat caj ke atas orang-orang yang menggunakan kemudahan-kemudahan dan khidmat yang diperuntukkan di dalam zon bebas. Ini dibenarkan di bawah s 10(3) Akta. Seksyen tersebut dibaca bersama s 13(2) Akta memberikan Menteri kuasa untuk membuat arahan yang perlu kepada pihak berkuasa relevan, dan dalam kes ini, kepada perayu-perayu untuk penggunaan betul zon bebas. Peraturan 8A oleh itu dibuat secara sah berikutan s 47 Akta (lihat perenggan 15 & 17).
- (3) Seksyen 10(3) Akta adalah penting dan memberi Menteri kuasa luas untuk mengenakan 'conditions' yang belia anggap betul bagi tujuan menjalankan apa-apa aktiviti di zon bebas. Ini termasuk mengenakan caj atau fi bagi kepentingan pihak berkuasa untuk memperuntukkan

A kemudahan-kemudahan dan khidmat di zon bebas. Caj atau fi yang dikenakan bukan untuk tujuan awam atau tujuan persekutuan (lihat perenggan 19).

B (4) Seksyen 4 Akta secara jelas menyatakan bahawa tiada cukai dikutip untuk tujuan aktiviti-aktiviti yang dijalankan di zon bebas. Cukai adalah wang yang dilevi kerajaan ke atas orang perseorangan atau perniagaan kerana menjalankan tindakan tertentu atau menyelesaikan transaksi tertentu di mana fi, walaupun dibayar kepada kerajaan oleh orang perseorangan atau oleh perniagaan, secara khususnya diguna pakai untuk penggunaan sesuatu khidmat. Wang daripada fi secara amnya tidak diguna pakai kepada penggunaan selain daripada memperuntukkan khidmat di mana fi diguna pakai. Dan selalunya, kadar fi secara terus berkait kepada kos untuk mengekalkan khidmat (lihat perenggan 13 & 20).]

D **Notes**

For a case on subsidiary legislation, see 1(1) *Mallal's Digest* (4th Ed, 2012 Reissue) para 167.

E **Cases referred to**

Lower Mainland Dairy Products Sales Adjustment Committee v Crystal Dairy Ltd [1933] AC 168, PC (refd)
Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal [2005] 3 MLJ 97, FC (distsd)

F **Legislation referred to**

Federal Constitution art 96
Free Zones Act 1990 ss 3(1), (2), 4, 10(3), 13(1), (2), (4), 15(1), 16(1), 47, Part III
Free Zones Regulations 1991 reg 8A, 8A(2)

G **Appeal from:** Civil Appeal No W-02–3327 of 2010 (Court of Appeal, Putrajaya)

H *Jasmeetpal Singh (G Pria with him) (Siew & Jasmeet) for the appellants.*
Tommy Thomas (Elaine Yap and Azmimi Pharmy with him) (Wong & Partners) for the respondents.
Amarjeet Singh all Singh (Senior Federal Counsel, Attorney General's Chambers) for the intervener.

I **Zulkefli CJ (Malaya) (delivering judgment of the court):**

INTRODUCTION

[1] This is an appeal by the appellants against the decision of the Court of

Appeal given on 13 December 2011 allowing the appeal by the respondents against the decision of the High Court. On 18 September 2012 this court had allowed the Attorney General of Malaysia to intervene in the proceedings and be an intervener in this appeal. Leave was granted to the appellants and the intervener to appeal against the whole of the decision of the Court of Appeal on the following question of law:

Whether the Minister of Finance has power under the Free Zones Act 1990 (Act 438) to impose charges on activities carried out or for facilities and services provided under the said Act?

BACKGROUND FACTS

[2] The relevant background facts of the case are as follows:

- (a) the Kuala Lumpur International Airport ('KLIA') Free Commercial Zone ('FCZ') was declared a free commercial zone by the Minister of Finance ('the Minister') pursuant to s 3(1) of the Free Zones Act 1990 ('the Act');
- (b) the first appellant was appointed by the Minister to administer, maintain and operate the KLIA FCZ under s 3(2) of the Act;
- (c) the respondents are companies that had been operating in the KLIA FCZ carrying out commercial activities since 1997. They are members of the Air Freight Forwarder Association of Malaysia ('AFAM') as well as the Conference of Asia Pacific Express Carriers ('CAPEC');
- (d) a free zones charge was imposed on all persons carrying out commercial activities at the KLIA FCZ. The charge is paid to the first appellant which maintains the free zone;
- (e) due to problems of payment of the charges to the first appellant the Free Zones Regulations 1991 were amended vide PU(A) 166/2007 to insert a new reg 8A which came into force on 20 April 2007;
- (f) there was a dispute between AFAM and CAPEC as to how the charge was to be established. It was clear that a charge was to be paid but the dispute was on the standard to be established to determine the charge;
- (g) when AFAM and CAPEC could not reach an agreement the Minister made a decision to maintain the charge set at RM5 per approved customs declaration and this was conveyed to the AFAM by letter dated 18 May 2007;
- (h) in this letter it was also made known that the first appellant could not continue to maintain and operate the KLIA FCZ if the charges were not paid by AFAM's members.
- (i) the respondents refused to pay the charge and commenced an action

- A seeking, amongst others, the following declarations against the appellants:
- (i) the letter issued by the Ministry of Finance dated 18 May 2007 is void ab initio and/or contrary to law;
- B (ii) a declaration that the appellants have no authority to collect the charge; and
- (iii) a declaration that the first appellant return all monies collected from the respondents from the year 2000;
- C (j) the first appellant counterclaimed the outstanding charges not paid by the respondents.

D DECISION OF THE HIGH COURT

- [3] The High Court in dismissing the respondent's action, inter alia, held that the Minister had the power to impose conditions in the form of charges based on ss 10(3) and 13(2) of the Act. The commercial activities carried out by the respondents fell within the First Schedule of the Act. The conditions that the Minister may impose were in respect of the activities that the respondents carried out in the free zone.
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F DECISION OF THE COURT OF APPEAL

- [4] The Court of Appeal reversed the decision of the High Court. In arriving at its decision the Court of Appeal applied the principle on the imposition of a tax as stated by the Federal Court in *Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal* [2005] 3 MLJ 97. The said principle states that before a tax can be imposed there must be clear words conferring such power to impose tax and that such words must be given strict construction. The Court of Appeal then applied the principle to ss 10(3) and 13(2) of the Act and arrived at the following conclusion:
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- We are of the view that the language of both ss 10(3) and 13(2) of the Act on the face of it does not show any intention on part of the Parliament to confer on the Minister of Finance a discretion or power to impose any charge or levy in respect of activities carried out in the FCZ but merely seeks to provide the types of activities and administration that can be allowed in the FCZ.
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The Court of Appeal then held that as a result of their finding, reg 8A of the Free Zones Regulations 1991 by imposing such levy is null and void being ultra vires the Act.

THE CONTENTION OF THE APPELLANTS AND THE INTERVENER A

[5] Learned senior federal counsel for the intervener and learned counsel for the appellants submitted before us that s 10(3) read with s 13(2) of the Act is not a taxing statute. The charge that is imposed is not a tax or levy. Only if the charge falls within the meaning of a tax or levy would the principle in *Palm Oil Research* then applies. B

[6] It was also submitted for the appellants and the intervener that from the wordings of reg 8A of the Free Zones Regulations 1991 ('the Regulations'), it is clear that the charge is levied on persons who carry out activities in a free zone. It is not addressed to the public at large or to a class of the public. It is only for those who choose to carry out their business in the free zone. The payment is enforceable by law. This is provided by reg 8A(2). The arrears are treated as a civil debt and the authority may enforce it under the law for recovery of such debt. Regulation 8A of the Regulations reads as follows: C

- (1) Where the Minister so directs, a free zones charge shall be payable by any person or his agent to the Authority in respect of every approved declaration under regulations 5, 21, 22, 23, 24, 25, 26, 27 and 28. E
- (2) Any free zone charge which is not paid within such period as may be prescribed by the Authority, or in arrears shall be treated as a civil debt owed by the person or his agent to the Authority and the Authority may avail itself of such means under the law for the recovery of such debt. F

THE CONTENTION OF THE RESPONDENTS

[7] Learned counsel for the respondents in support of the decision of the Court of Appeal submitted amongst others that the FCZ charge is in substance and reality a tax, duty, levy or a pecuniary burden. The FCZ charges are not collected pursuant to any agreement and therefore there is no contractual basis for it. It was also the contention of the respondents that the amendment made by the addition of reg 8A to the Regulations with effect from 20 April 2007 was intended to legitimise the collection of the FCZ charges and not in consideration of any defined services. It is rather a charge collected as a form of revenue. In the circumstances it was submitted that the Court of Appeal was correct in characterising the FCZ charge as a form of tax duty, levy or a pecuniary burden on a corporate citizen that is purported to have legislative basis when in fact it was not provided for under the Act. G

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[8] It was further submitted for the respondents that the said Act is not a taxing statute. In support art 96 of the Federal Constitution was referred to which provides as follows:

A No tax or rate shall be levied by or for the purpose of the Federation except by or under the authority of the Federal law.

B [9] It was contended for the respondents that the courts must take a purposive approach in the interpretation of any statute. The courts must ask the question whether the Act was intended by Parliament to be a taxing statute. To the respondents the principal operative effect of the Act is to enable goods and services (except prohibited goods and services) to be brought into, produced, manufactured or provided in a free zone without payment of any customs duty, excise duty, sales tax or service tax. The plain words of ss 10(3) and 13(2) of the Act do not show any intention on the part of Parliament to confer on the Minister a discretion to impose any charge or levy in respect of activities carried out in the FCZ. It is the contention of the respondents that taxing statutes are to be construed strictly. The requirement for clear, expressed and unambiguous language in a taxing statute is well established (see the case of *Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd*).

E [10] The respondents further contended that as ss 10(3) and 13(2) of the Act do not confer upon the Minister's powers to impose any FCZ charges, it necessarily follows that reg 8A of the Regulations is in turn also ultra vires the Act. A subsidiary legislation must be subservient to the principal legislation.

DECISION OF THIS COURT

F [11] We are of the view the test whether a particular written law is a taxing statute is as stated by the Privy Council in *Lower Mainland Dairy Products Sales Adjustment Committee v Crystal Dairy Ltd* [1933] AC 168 at p 175 as follows:

G In the opinion of Their Lordships, the adjustment levies are taxes. They are compulsorily imposed by a statutory committee consisting of three members, one of whom is appointed by the Lieutenant-Governor in Council, the other two being appointed by the dairy farmers within the district under s 6 of the Act. They are enforceable by law, and a certificate in writing under the hand of the chairman of the committee is to be prima facie evidence in all courts that such amount is due by the dairy farmer (s 11). A dairy farmer who fails to comply with every determination, order or regulation made by a committee under the Act is to be guilty of an offence against the Act (s 13), and to be liable to a fine under s 19. Compulsion is an essential feature of taxation: *City of Halifax v Nova Scotia Car Works, Ltd* [1914] AC 992. Their Lordships are of opinion that the committee is a public authority, and that the imposition of these levies is for public purposes.

I [12] From the above cited case, for a 'payment' to be a tax, the criteria required to be satisfied is as follows:

- (a) the payment is compulsorily imposed;

- (b) the payment is enforceable by law; A
- (c) there must be compulsion to pay; and
- (d) the imposition of the payment is for a public purpose. B

[13] On the question whether the charge is levied for a public purpose or for purposes of the Federation, we are of the view that the legislative scheme of the Act must be considered. Section 4 of the Act expressly provides that goods and services of any kind except those prohibited by law may be brought into, produced, manufactured or provided a free zone without payment of any customs duty, excise duty, sales tax or services tax. Therefore under s 4 of the Act no tax is collected for the purposes of the activities carried out in a free zone. C

[14] It is our considered view in enacting reg 8A of the Regulations the Legislature has taken into consideration the following provisions of the Act: D

- (a) s 10(3) which provided that:

Notwithstanding anything to the contrary in any written law, the Minister may allow any activity to be carried out in a free zone subject to such conditions as he may deem fit to impose. E

- (b) s 13(2) which provided that:

The Minister may give to the Authority such directions as he may consider necessary for the proper functioning of a free zone ... F

- (c) s 47 which provided that:

The Minister may make regulations as may be necessary or expedient for giving full effect to the provisions of this Act or the carrying out of the purposes of this Act. G

[15] As regards whether reg 8A of the Regulations is ultra vires the Act, we are of the view reg 8A has been validly enacted pursuant to s 47 of the Act. We noted that the very letter issued by the Ministry of Finance dated 18 May 2007 which the respondents sought to declare void provides, inter alia, as follows: H

Malaysia Airport (Sepang) Sdn Bhd (MAB) sebagai Pihak Berkuasa Zon di Kawasan Perdagangan Bebas di KLIA telah melaporkan ke Kementerian ini bahawa amaun tertunggak caj pemprosesan FCZ pada 14 Mei 2007 adalah sebanyak RM24,092,834. MAB juga memaklumkan bahawa mereka tidak boleh beroperasi sekiranya menanggung kerugian dan akan hanya terus sanggup menjadi Pihak Berkuasa Zon di FCZ KLIA sekiranya tunggakan tersebut dijelaskan. I

[16] The letter dated 18 May 2007 from the Ministry of Finance shows that

- A** the appellants are incurring losses and cannot continue to carry on its functions to administer, maintain and operate the free zone. To administer, maintain and operate the free zone the first appellant is required by Part III of the Act to do the following things:
- B** (a) to provide and maintain or allow in the free zone such facilities for the proper and efficient functioning of the zone (s 13(1));
- (b) to provide adequate enclosures for the movement of persons, conveyances, vessels and goods entering and leaving a free zone (s 13(4));
- C** (c) no entry or residence in a free industrial zone without permission of the authority (s 15(1)); and
- (d) to order the exclusion or removal of goods or to discontinue activities which are dangerous or prejudicial to public interest, health or safety (s 16(1)).
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[17] We agree with the submission of learned counsel for the intervener that in view of the appellants' function to administer, maintain and operate the free zone the Minister is justified in imposing the condition of the charge on persons using the facilities and services provided in the free zone. This is in our view allowed under s 10(3) of the Act. This section when read together with s 13(2) of the Act confers on the Minister powers to give directions that are necessary to the relevant authority and in the present case to the appellants for the proper functioning of a free zone.

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[18] As regards the meaning to be attached to the word 'condition' in s 10(3) of the Act so as to include a form of payment we would refer to the *New Shorter Oxford English Dictionary* that defines 'condition' to mean 'a thing demanded or required as a prerequisite to the granting or performance of something else'. In our view in the context of the present case the condition is the payment for the facilities and services rendered by the authority, that is administering, maintaining and operating the free zone area.

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[19] It is our judgment s 10(3) of the Act is of wide import and gives the Minister very wide powers to impose 'conditions' he deems fit for the purposes of carrying out any activity in the free zone. This would include imposing a charge or fee for the benefit of the authority for providing the facilities and services in the free zone. It is our judgment that a charge or a fee imposed is not for the public purpose or for the purposes of the Federation. The present case can be distinguished from the case of *Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal* cited in support of the respondent's case in that in the Palm Oil Research's case the 'cess' or the tax levied goes to the government as its revenue unlike in the present

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CONCLUSION

[20] Thus, in brief, the distinction between a tax and a fee is this: a tax may be described as the money that a government levies upon an individual or business having performed a particular action or completed a particular transaction, whereas a fee, even if it is a charge paid to the government by individuals or by a business, is specifically applied for the use of a service. Money from the fee is generally not applied to uses other than to providing the service for which the fee is applied. And usually a fee rate is directly tied to the cost of maintaining the service.

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[21] For the reasons abovestated we would answer the question posed in this appeal in the affirmative. In the result we would allow this appeal with costs. The order of the Court of Appeal is set aside and the order of the High Court is hereby restored. We make an order of costs of RM50,000 to be paid by the respondents to the appellants and no order of costs to the intervener. Deposit is to be refunded to the appellants.

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Appeal allowed with costs, decision of the Court of Appeal set aside and order of the High Court restored.

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Reported by Ashok Kumar

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